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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Appellants

VS.

LEONARD PAUL HODORY,
Appellee

On Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE PRIOR TO CONSIDERATION OF JURISDICTIONAL STATEMENT AND BRIEF FOR REPUBLIC STEEL CORPORATION AS AMICUS CURIAE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE PRIOR TO CONSIDERATION OF JURISDICTIONAL STATEMENT

Republic Steel Corporation respectfully moves for leave to file a brief amicus curiae pursuant to Rule 42(1). Attorney for appellent has consented to the filing of such a brief, atttorneys for appellee have not. Its brief is in support of the position of appellant.

Republic Steel Corporation has an interest in this case. The decision of the Three Judge District Court allowed unemployment benefits to some five hundred eighty of its employees, included as a part of the class

with Hodory, Appellee herein, whose claims for benefits had been denied by the administrator of the Ohio Bureau of Employment Services.

Under Ohio law, (Sec. 4141.28(G) (4) R.C.) benefits paid to Republic Steel Corporation's employees are charged to its account with the Bureau and under the state's experience rating system will be paid by Republic Steel Corporation through an increase in its payroll tax for unemployment compensation.

The decision of the administrator of the Ohio Bureau of Employment Services denying benefits to the plaintiffs-appellees was appealed to the Board of Review where the claims are now pending but are being stayed pending a final decision in this case.

Republic Steel Corporation is an interested party in these cases now under appeal with the Board of Review. (Sec. 4141.01 and Sec. 4141.28 Revised Code of Ohio)

Plaintiffs-appellees have an adequate remedy under state law which they have not xhausted.

Republic Steel Corporation was not made a party in the instant case, was denied an opportunity to appear and present evidence as to the economic impact on it resulting from the payment of benefits and has not yet been permitted to intervene. This constitutes a denial of due process under the Fifth Amendment.

Although Republic Steel Corporation supports the arguments and conclusions contained in the excellent Brief of the Attorney General on behalf of the appellants herein, the interests of the Bureau of Employment Services cannot be the same as that of the Republic Steel Corporation and therefore its interests

are not adequately represented by the appellants in this case.

The principle that a governmental agency cannot adequately represent the interests of a private party has been expressed in the case of *Trbovich v United Mine Workers*, 404 N.S. 528, at 538 (1972).

For the foregoing reasons, Republic Steel Corporation respectfully requests that this motion for leave to file the annexed brief amicus curiae be granted.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF FOR REPUBLIC STEEL CORPORATION AS AMICUS CURIAE

This brief is submitted in support of the Jurisdictional Statement of the Appellants, Ohio Bureau of Employment Services and Albert G. Giles, Administrator.

I. STATEMENT OF THE CASE AND FINDING OF FACTS

Republic Steel Corporation agrees with the Statement of the Case, Finding of Facts and Questions Presented which have been stated in the Jurisdictional

Statement of the Appellants and are not repeated here.

II. REPUBLIC STEEL CORPORATION HAS A VERY REAL AND DIRECT INTEREST IN THIS CASE

Claims for unemployment benefits by some five hundred eighty employees of Republic Steel Corporation, included in the class with Hodory, appellee herein, were denied by the administrator of the Ohio Bureau of Employment Services. Under the decision of the Three Judge District Court benefits would be allowed in these Cases and would be charged to the account of Republic Steel Corporation on the books of the Ohio Bureau of Employment Services. (Sec. 4141.28 of Ohio Revised Code)

Under the experience rating provisions of the Ohio Unemployment Comepnsation law these benefits would be paid by Republic Steel Corporation through an increase in its payroll taxes for unemployment compensation purposes.

III. ARGUMENT

DUE PROCESS HAS BEEN DENIED REPUBLIC STEEL CORPORATION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The plaintiff-appellee herein did not name Republic Steel Corporation a defendant in this case although several hundred of its employees were included in the class which plaintiff-appellee claims to represent. As stated above, Republic Steel's financial interests are materially involved in any decision in this case.

Consequently no opportunity was afforded Republic Steel Corporation to appear or submit evidence before the Three Judge District Court showing its interest and the financial impact on its account with the Ohio Bureau of Employment Services. A Motion to Intervene filed with the Federal District Court has not been allowed at this time.

The Ohio law at Sec. 4141.28 Revised Code made Republic Steel Corporation an interested party in these cases at the state administrative level thereby being entitled to notice and an opportunity to particiipate at each step in the proceedings including the right to appeal to the state courts.

These cases are now pending with the Board of Review of the Ohio Bureau of Employment Services.

DENYING UNEMPLOYMENT BENEFITS FOR UNEMPLOYMENT DUE TO A LABOR DISPUTE IS A LEGITIMATE, REASONABLE AND NECESSARY STATE PURPOSE AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT NOR THE PROVISIONS OF THE FEDERAL SOCIAL SECURITY LAW.

The long and intersting history of labor dispute provisions in unemployment compensation laws, going back to early British law, has been described in some detail in the Brief of the Attorney General of Ohio on behalf of the Ohio Bureau of Employment Services.

The strong and well identified thread running through the entire history of this type of legislation is one of "neutrality" on the part of the government in labor disputes.

When the Social Security Laws were first enacted in August, 1935, encouraging the states to pass their own unemployment compensation laws, wide latitude was given the states in the type of law they might adopt.

This was particularly true in the areas of coverage, conditions of eligibility and the disqualifications of claimants for benefits.

For example, only employers of eight or more employees were covered under the original federal and state law. Agricultural labor, domestic service, public employees and many other types of workers were excluded from the program. This was considered a reasonable and necessary discrimination to accomplish a valid state purpose.

Only a few basic provisions in a state law are required by Title III for the Certification by the Secretary of Labor for entitlement of administrative funds for the operation of a state unemployment compensation law. These include provisions for

(1) Insuring that full benefits will be paid when due.
(2) Payment of benefits through public employment offices.
(3) Opportunity for a fair hearing.
(4) The deposit of all contributions with the Secretary of the Treasury of the United States.
(5) The expenditure of all money withdrawn from the Treasurer for the sole purpose of paying unemployment benefits.

None of the above conditions have been violated by the Ohio law and all its present provisions have been so certified by the Secretary of Labor.

From its inception in December, 1936, the Ohio law has contained a provision in one form or another denying benefits to employees whose unemployment is due to a strike or labor dispute. The Ohio legislature has consistently adhered to the policy of "state neutrality" in labor disputes.

At the time the instant case arose the Ohio law provided that no individual may serve a waiting period or be paid benefits for any week with respect to which the administrator finds that:

> "(a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor disputes." (Sec. 4141.29(D)(1)(a) Ohio Revised Code.)

This is a reasonable classification and distinction within the discretionary powers vested in the state.

PAYING BENEFITS FOR UNEMPLOYMENT DUE TO A LABOR DISPUTE VIOLATES A STATE'S OBLIGATION TO MAINTAIN NEUTRALITY IN LABOR DISPUTES, AND WOULD WRONGFULLY INVADE THE FIELD OF LABOR RELATIONS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT GUARANTEEING FREE COLLECTIVE BARGAINING.

The case of *Hawaiian Telephone Co. v. State of Hawaii Department of Labor and Industrial Relations*, United States District Court, District of Hawaii, Civil No. 74-140 (10-1-75) supports the principal that

it is a state's obligation to maintain neutrality in labor disputes.

The present Ohio labor dispute provision is obviously an expression by the legislature evidencing this intent.

It is claimed by the plaintiff-appellee in this case however that the legislature has over-stepped its bounds by denying benefits for unemployment due to a labor dispute where the claimants are not actually participating in the dispute.

What constitutes remaining "neutral?" Clearly if a state imposes a tax or other financial obligation upon the employer because of a labor dispute with which he otherwise would not be burdened it is not remaining neutral.

Unemployment benefits paid to an employer's workers who are unemployed due to a labor dispute but who are not actually participating in the dispute is an equally effective weapon to be used against the employer at the bargaining table as benefits paid to those actually participating.

It is the total financial hardship which the state would impose upon him which weakens or destroys his ability to bargain on an equal basis which is paramount.

It cannot be disputed that unemployment benefits paid to an employer's workers become a financial obligation to the employer through the state's experience rating system.

For example in the case of *Abernathy v. Eastern Air Lines*, 259 N.C. 190, 130 S.E. 2d 292, (1963), Certiorari denied, U.S. Sup. Ct. 375 U.S. (1963), a relatively few flight engineers of Eastern Air Lines,

Inc. went on strike causing several thousand of its employees to lose their employment due to the labor dispute.

If these thousands of employees not participating in the dispute, but whose unemployment was due to the dispute, were to be paid unemployment benefits and charged to Eastern's account, it is safe to say that the pressure upon Eastern's representatives at the bargaining table would be devastating. Free collective bargaining as assured by the National Labor Relations Act would be impossible.

THIS COURT HAS SPOKEN ON THE ISSUE IN THIS CASE IN DENYING CERTIORARI IN A CASE INVOLVING THE CONSTITUTIONALITY OF LABOR DISPUTE PROVISIONS SUBSTANTIALLY THE SAME AS THOSE IN THE INSTANT CASE.

In *Abernathy* supra, this Court had before it a decision of the Supreme Court of North Carolina holding valid a provision in the North Carolina Unemployment Compensation law which denies benefits in labor dispute cases under situations almost identical to those in the present case.

The *Abernathy* case arose in 1962 several months after the North Carolina General Assembly amended its labor dispute provision, effective July 1, 1961, to read as follows:

> "An individual shall be disqualified for benefits . . .
>
> "(4) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is

> or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. Provided, that an individual disqualified under the provisions of this subdivision shall continue to be disqualified thereunder after the labor dispute has ceased to be in active progress for such period of time as is reasonably necessary and required to physically resume operations in the method of operating in use at the plant, factory, or establishment of the employing unit." (G.S. 96-14(4) N.C.)

We quote the pertinent provisions of both the Ohio and North Carolina laws to show the similarity of purpose even though slightly different language is employed.

It is important to note here that prior to its amendment effective July 1, 1961, the North Carolina labor dispute provision did not deny benefits if it were shown that the individual was not participating, financing or interested in the labor dispute.

Approximately a year after its enactment on July 1, 1961, this amendment was challenged in the North Carolina Courts on the grounds that it constituted an unlawful discrimination in violation of the State and Federal Constitutions—the same grounds that are being advanced in the instant case.

The Supreme Court of North Carolina in upholding the validity of the amendment in question stated in pertinent part:

". . . in passing the 1961 amendment the North Carolina General Assembly acted within its constitutional powers. When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment and its action within its range of discretion cannot be set aside because compliance is burdensome" (Citations omitted) . . .

"The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. The further disqualifications contained in the 1961 amendment involves a question of degree and not of principle."

This court denied certiorari in the North Carolina Case December 2, 1963. U.S. Sup. Ct. 375 U.S. 161.

CONCLUSION

It is submitted that Republic Steel Corporation has a very real and genuine financial interest in the outcome of this case.

It is further submitted that Due Process under the Fifth Amendment has been denied Republic Steel Corporation.

It is further submitted that denying unemployment benefits for unemployment due to a labor dispute is a legitiment state purpose.

It is further submitted that paying benefits for unemployment due to a labor dispute violates the state's obligation to maintain neutraliy in labor disputes.

This Court has denied Certiorari in a case involving the constitutionality of a North Carolina statute containing substantially the same provisions at issue in the present case.

For the above reasons Republic Steel Corporation as amicus curiae urges this Court to reverse the Three Judge District Court's decision in this case.

Respectfully submitted,

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